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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 30, 1997

Mr. William Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: WT Docket No. 96-162

Dear Mr. Caton:

Enclosed for filing in the above-captioned docket are an original and one copy of a letter from BellSouth to William E. Kennard dated July 28, 1997. The letter was delivered to Mr. Kennard's office and other offices within the FCC on July 28, 1997. Although the letter was date-stamped by the Office of General Counsel on July 28, 1997, through inadvertence the letter was not filed with the Secretary's office on that date.

Very truly yours,

David G. Frolio

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List ABCDE

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July 28, 1997

Mr. William E. Kennard
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CMRS Safeguards, WT Docket No. 96-162

Dear Mr. Kennard:

As you know, the argument has recently been advanced that certain sections of the Telecommunications Act that are directed solely at the Bell Operating Companies constitute an unlawful bill of attainder. In BellSouth's view, the same is true of the Commission's existing cellular structural separation rule, Section 22.903, and would be true of any replacement for that rule that imposes "safeguards" on BOC provision of commercial mobile services, where such safeguards are not demonstrated to be necessary, on the basis of the record, with respect to the particular companies or class of companies to whom the safeguards are applicable, as distinguished from all other companies or classes of companies.

While safeguards directed specifically at the BOCs, like the present Section 22.903, would obviously be the most suspect under a bill of attainder analysis, it is equally true that safeguards directed at a particular class of carriers (*e.g.*, "large" or "Tier 1" LECs) may constitute a bill of attainder if there is not a substantial, nondiscriminatory justification in the record for uniquely subjecting that class of carriers to the particular safeguards at issue. For that reason, the Commission should reject the call of some to exempt all "mid-sized" and "rural" LECs from any safeguards adopted.[1]

Over a year and a half ago, the Sixth Circuit criticized the Commission's continued imposition of a structural separation requirement on BOC cellular operations because, among other things, "[t]he disparate treatment afforded the Bell Companies impacts on their ability to

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[1]*See, e.g., ex parte* letter from Michael S. Wroblewski, Esquire, counsel for ITTA, to Suzanne Toller, Esquire, dated July 3, 1997 in this docket.

compete in the ever-evolving wireless communications marketplace."[2] As the Commission has recently acknowledged, that marketplace is becoming more and more competitive every day — 54 percent of auctioned licenses have gone to new competitors, fifty markets now have three or four competitors, and prices are being slashed in response to competitive pressures.[3] Disparate regulation in this increasingly competitive environment amounts to punishment by rule, in violation of the constitutional ban on bills of attainder.

In its *CMRS Safeguards* proceeding, the Commission must confront the fact that a structural separation requirement imposed on the BOCs alone (whether by name or by describing a class essentially limited to the BOCs) is an unconstitutional bill of attainder that will be subject to vacation by a reviewing court. The remainder of this letter describes the reason why such rules are unconstitutional.

The constitutional bar on bills of attainder[4] prohibits Congress, or an agency acting under authority of an Act of Congress,[5] from imposing penalties on particular persons (or a fixed class of persons) without a judicial trial.[6] Both the existing provisions of Section 22.903 and the revised "safeguards" the *NPRM* proposes to apply to the BOCs for cellular service violate this constitutional provision.

Section 22.903 applies only to particular persons—it specifically states that it applies to "Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, U.S. West, Inc. [sic], their successors in interest and affiliated entities (BOCs)."[7] The Sixth Circuit recently pointed out that the

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[2]*Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

[3]*Commission Opens Inquiry on Competitive Bidding Process for Report to Congress*, Docket No. WT 97-150, *Public Notice*, FCC 97-232, § II.C (July 2, 1997).

[4]U.S.CONST., Art. I, § 9, cl. 3 provides: "No Bill of Attainder or ex post facto Law shall be passed."

[5]*See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 143 (1950) (concurring opinion of Black, J.); *cf. Rodriguez v. United States Parole Commission*, 594 F.2d 170, 173-74 (7th Cir. 1979) (holding that bar on ex post facto laws applies to agencies acting under statutory rulemaking authority); *see generally* TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-6 (2d ed. 1988).

[6] *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984); *see generally* TRIBE, *supra*, at § 10-4.

[7]47 C.F.R. § 22.903.

BOCs are "the only group under the structural requirement."[8] The Commission has never given any explanation for why these particular companies are the only ones subject to the rule, other than that they are the LEC descendants of AT&T.[9] Even if the reasons given by the Commission for its earlier imposition of structural separation only on AT&T—its vast size and resources, dwarfing all other telecommunications companies, and its unique position of dominance over all aspects of telecommunications in the nation[10]—had properly established a "legitimate class of one,"[11] none of these characteristics is applicable to the post-divestiture BOCs.

In fact, the *NPRM* acknowledges that any justification for imposing restrictions on the BOCs arguably applies with equal force to GTE—which is larger than any single BOC—or "to all LECs above a particular size, e.g., all Tier 1 LECs."[12] The Commission gives no reason for proposing to continue applying Section 22.903 to the BOCs while exempting all other Tier 1 LECs (including GTE) other than the unsupported conclusion that "the relative benefits" of applying the rule evenhandedly "would [not] outweigh the costs."[13] In other words, the rule applies to the BOCs alone simply because they are the descendants of AT&T. It is well established, however, that a statute that imposes penalties on the offspring of a designated wrongdoer falls within the scope of a prohibited bill of attainder.[14] Section 22.903 applies to

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[8] *BellSouth Corp. v. FCC*, 96 F.3d 849, 851 (6th Cir. 1996).

[9] *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117, 1136-37, 1150-51 (1983) (*BOC Separation Order*), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *recon.*, 49 Fed. Reg. 26,056, 26,063 (1985), *aff'd sub nom. North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985).

[10] *Cellular Communications Systems*, CC Docket 79-318, *Memorandum Opinion and Order on Reconsideration*, 89 F.C.C.2d 58, 79-80 (*Cellular Reconsideration Order*), *further recon.*, 90 F.C.C.2d 571 (1982), *petition for review dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

[11] *Nixon v. Administrator of General Services*, 433 U.S. 425, 472 (1977).

[12] *Notice of Proposed Rulemaking, Order on Remand, and Waiver Order*, FCC 96-319 (August 13, 1996) (*NPRM*) at ¶ 89.

[13] *NPRM* at ¶ 90.

[14] *See United States v. Brown*, 381 U.S. 437, 442 (1965) (observing that a statute that prescribes a penalty such as "exclusion of the designated party's sons from Parliament," constitutes a "bill of pains and penalties" that falls within the scope of the constitutional ban on bills of attainder).

particular specified companies, not to all companies engaging in (or likely, on the basis of a record, to engage in) particular wrongful behavior.[15] Accordingly, the rule contains the degree of specificity needed to constitute a bill of attainder.[16] Any rule subjecting all "large" or "Tier 1" LECs to safeguards would similarly be sufficiently specific to constitute a bill of attainder, in the absence of a factual record demonstrating that all members of such a class of companies, unlike other companies, have engaged in wrongful behavior or are uniquely positioned and incented to do so.

The rule also imposes a penalty on the BOCs, which is now the law of the case.[17] The *Cincinnati Bell* Court found that the "disparate treatment afforded the Bell Companies impacts on their ability to compete in the ever-evolving wireless communications marketplace" and "*severely penalizes*" them "at a time when the communications industry is exploding and changing almost daily."[18]

Moreover, the rule is a "legislative bar[] to participation by individuals or groups in specific employments or professions,"[19] which constitutes a "penalty" for purposes of the Bill of Attainder clause,[20] whether the bar has been established for retribution or for preventive purposes.[21] The Supreme Court has held that such preventive purposes must be accomplished "by

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[15]*See Communist Party v. Subversive Activities Control Board,* 367 U.S. 1, 86 (1961) (holding that a statute is not a bill of attainder when "[i]t attaches not to specified organizations but to described activities in which an organization may not engage").

[16]*See United States v. Lovett,* 328 U.S. 303 (1946) (holding that a statute subjecting particular named persons to penalties was a prohibited bill of attainder).

[17]Under the law of the case doctrine, issues decided by an appellate panel may not be revisited by the lower tribunal on remand. *See generally Ohio Oil Co. v. Thompson,* 120 F.2d 831 (8th Cir. 1941), *cert. denied,* 314 U.S. 658 (1941).

[18]*Cincinnati Bell,* 69 F.3d at 768 (emphasis added).

[19]*Minnesota Public Interest Research Group,* 468 U.S. at 852.

[20]*See Brown,* 381 U.S. at 450 (bar on holding union office); *Lovett,* 328 U.S. at 314 (bar on holding federal government job); *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277 (1866) (bar on engaging in specific named professions); *Ex Parte Garland,* 71 U.S. (4 Wall.) 333 (1866) (bar on practicing before federal courts).

[21]*See Brown,* 381 U.S. at 458-59 ("A number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble . . . and therefore

rules of general applicability," and not by a rule that "specif[ies] the people upon whom the sanction it prescribes is to be levied."[22] Section 22.903, however, flatly prohibits the regional BOCs and all of their successors and affiliates, other than a structurally separated affiliate, from engaging in the provision of cellular service; prohibits their officers and personnel from being employed by the structurally separated cellular affiliate; prohibits the structurally separated cellular affiliate from engaging in the provision of local exchange telephone service; and prohibits the affiliate's officers and employees from being employed by the BOC. The fact that the regional BOCs may establish a structurally separated affiliate to offer cellular service does not get around the fact that this rule bars the BOCs from engaging in the cellular business, because the rule specifically requires that any such affiliate must "operate independently in the provision of cellular service."[23]

In other words, under the rule, BellSouth's LEC subsidiary, BellSouth Telecommunications, Inc., may not provide cellular service, and any affiliate doing so must "operate independently." The Commission has long recognized that this rule imposes significant costs on the companies to which it is subject.[24] It further acknowledges this fact in the *NPRM*.[25] Imposing these costs and placing these constraints on the BOCs and their affiliates *simply because of the companies' identities* plainly constitutes a "penalty" for purposes of the Bill of Attainder clause.

Finally, the bar applies to the BOCs as the result of rulemaking, not a judicial trial (or its administrative equivalent, an on-the-record hearing) based on objective, generally-applicable standards. Originally, the structural separation rule was to have applied prospectively to all LECs, given their control over interconnection at the outset of cellular service.[26] It was then

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inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.").

[22] *Id.* at 461.

[23] 47 C.F.R. § 22.903(b).

[24] *Cellular Reconsideration Order,* 89 F.C.C.2d at 78 (acknowledging the "costs to the independent telephone companies associated with the separate subsidiary requirement, including the cost of additional personnel and the possible dis-economies resulting from separate transmission facilities" and noting that "such costs may be prohibitive for some companies"); *id.* at 80 (stating that "the costs of the requirement, measured in terms of economic inefficiency, decrease as the size of the firm increases").

[25] *See, e.g., NPRM* at ¶¶ 38, 50-52, 90, 92.

[26] *See Cellular Communications Systems*, CC Docket 79-318, *Report and Order*, 86 F.C.C.2d 469, 493-95 (1981).

narrowed to apply only to AT&T without any quasi-judicial record-based factual determination,[27] and later changed to specify the regional BOCs and their affiliates, again without any quasi-judicial record-based factual determination.[28] These companies were uniquely subjected to this rule *by name* not because of some objective factual determination but as a matter of legislative policy. As the Supreme Court has stated, "[t]he effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that this cannot be done . . . by the United States."[29]

The *NPRM* proposes to continue imposing this punishment, again without any judicial or quasi-judicial determination and without applying any objective, uniformly applicable standards, in flagrant violation of the Bill of Attainder clause. BellSouth submits that the constitution requires elimination of the BOC cellular structural separation requirement and further bars the adoption of "safeguards" that apply to the BOCs without a valid factual basis in the record for treating the BOCs, or any class of carrier subject to the safeguards, differently from other LECs.

Respectfully submitted,

William B. Barfield

cc: Chairman Hundt
Commissioner Quello
Commissioner Ness
Commissioner Chong
Daniel Phythyon
Regina Keeney
John Nakahata

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[27] *See Cellular Reconsideration Order*, 89 F.C.C.2d at 78-80.

[28] *See BOC Separation Order*, 95 F.C.C.2d at 1136.

[29] *Lovett*, 328 U.S. at 316-17 (footnote omitted).